IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 122 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE

HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
ABDUL SAMAD MOHAMMAD IBRAHIM - Opponent(s)

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Appearance :

MR LR PUJARI Ld. APP for Appellant(s) : 1,
MR SV RAJU Ld. Sr. ADVOCATE WITH MR ABHAYKUMAR P SHAH

for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 08/09/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. This appeal is preferred by the State under sec. 34(1)(4) of the Prevention of Terrorism Act, 2002 (Hereinafter referred to as 'POTA' for short) with a prayer to cancel the bail granted to the respondent by the learned Special Judge (POTA) vide order dated 16.9.2004 passed in Criminal Misc. Application No. 2220/2004 in POTA Case No. 12/2003.

2. The respondent was arrested in connection with I-CR No. 6/2003, which was subsequently numbered as POTA Case No. 12/2003 for the offences punishable under sec. 120-B, 121, 121A, 122, 123 of IPC, 3(1)a, b, 3(3), 4, 20, 21(2)b, 22(2) of POTA and under sec. 25(1)b, c, 27 and 29 of the Arms Act. As per the prosecution case, the Joint Police Commissioner received a tip off that certain youths in Ahmedabad city in the month of April, 2003 had gone to Pakistan to take training from the Terrorist Organisations with a view to take revenge for the loss of lives caused to the Muslim Community as well as to terrorise the people of Hindu Community. The information was received by the complainant that on 3.4.2003 some boys who had taken training at

Pakistan were going to meet at Parimal Garden near the Sandesh Chowk and one of them was also having a fire arm. The police arrested these persons and during the course of investigations, the names of other 14 to 15 persons were also disclosed. The present respondent who was arrested, filed the bail application before the learned Special Judge, POTA Court and he was granted bail by the learned Special Judge. Being aggrieved by the aforesaid order, the State has preferred the present appeal, contending inter alia, that during the course of investigation, the respondent had contacted the main conspirator and co-accused Rasul Party. The respondent and accused Rasul Party had a very closed relationship and they were interacting with each other with the common intention to cause terror among the Hindu community. Learned APP Mr. LR Pujari submitted that co-accused Rasul Party absconded from Saudi Arabia and as the respondent played a very vital role in making good the escape of main conspirator, he ought not to have been granted bail by the learned Special Judge. The statement of Rafik @ R.D. was not taken into consideration by the learned Special Judge in proper perspective while granting bail to the respondent. During the course of the investigation, it also

emerged that Mufti Sufiyan and Sohail Khan had absconded or had gone underground. It was also revealed that certain other persons namely Kalim, Anas and Shanawaz were also not traceable. The respondent had actively participated in the commission of crime and, therefore, the learned Special Judge has committed egregious error in releasing the respondent on bail. The learned Special Judge ought to have taken into consideration while enlarging the respondent on bail the fact emerged during the course of investigation in respect of the respondent that he was not only in touch with the main accused Rasul Party who had absconded but had also initially agreed to receive the training for terrorist activity at Pakistan. As the State has made out a strong case for cancelling the bail of the respondent, the prayer as set out in the appeal to cancel the bail be granted and the respondent be immediately taken in custody.

3. Learned Sr. advocate Mr. SV Raju representing the respondent submitted that the prosecution has miserably failed to prove the prima facie involvement of the respondent in the commission of the crime. Learned Advocate further submitted that on bare

perusal of the confessional statement, it only reveals that he had helped some of the accused by sending them to Jamat and, there was no charge against the respondent for harbouring the accused. The present accused is cited as a witness in a separate case being POTA Case No. 10/2003 (the murder of Ex Home Minister of Gujarat). Thus, when the CBI made him a witness on the same or similar facts, it cannot be used to implicate him as an accused. The statement of B-33 does not help the prosecution case in any manner whatsoever because B-33 does not say anything before the Magistrate and whatever was said by him was a hear-say and, therefore, no reliance can be placed on such a statement. The learned Advocate submitted that in pursuance of the order passed by the learned Special Judge, the respondent was released by an order dated 16.9.2004 and, till this date, he has not indulged in any activity which would call for the cancellation of bail granted to him by the learned Special Judge. Thus, the learned Advocate for the respondent submitted that the State has not made out a case for cancellation of bail granted to the respondent and, therefore, the appeal preferred by the State for cancellation of bail does not call for any

interference and the same is liable to be rejected. The learned Advocate has placed reliance on the following judgments in support of the submissions canvassed at the Bar and, they are as under:

(1) (2005)3 SCC 143

(Panchanan Mishra vs. Diganbar Mishra & Ors.)

(2) (1995)1 SCC 349

(Dolat Ram & Ors. vs. State of Haryana)

4. This Court has heard Mr. L. R. Pujari, learned Additional Public Prosecutor for the appellant-State and Mr. S. V. Raju, learned Advocate for the respondent-accused, at length and in great detail. This court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire material on record of the case.

5. We have carefully perused the order pased by the ld. Special Judge POTA in Criminal Misc. Application No. 2220/2004 and the reasons assigned by the learned Special Judge in enlarging the respondent on bail.

The statement recorded under sec. 32 of the POTA of B-33 as well as of the respondent is carefully perused by us. On perusal of the confessional statement, it becomes clear that the role of the respondent was limited. He had helped some of the accused by sending them to Jamat at the behest of Mufti Sufiyan, an absconding accused. He has not been charged for harbouring the other accused. We have also taken into consideration the role which is attributed to the respondent in the alleged criminal conspiracy. Thus, taking into account the role played by the respondent, we are of the view that very cogent and overwhelming circumstances are necessary for cancellation of bail granted by the ld. Special Judge.

6. It is well settled by the catena of decisions rendered by the Apex Court and the High Court, that power of cancellation of bail is required to be exercised with care and circumspection, as it involves review of the decision already made. It is permitted only if by reason of supervening circumstances, it would no longer be conducive to a fair trial to allow the accused to retain his freedom during the trial. Thus, very cogent and overwhelming

circumstances are necessary to cancel bail under sec. 34 of the POTA and under sec. 439(2) of the Code. The other reasons such as; (i) the accused is found tampering with evidence; (ii) whem the person on bail commits similar offence or heinous offence; (iii) the prospects of the accused absconding during the trial; (iv) the misuse of privilege of bail granted to the accused – are also required to be considered while cancelling the bail granted to the accused.

7. It is evident from the record of the case that no breach was committed by the respondent of the terms and conditions imposed by the learned Special Judge POTA by order dated 16.9.2004. The ld. Special Judge has also discussed in great detail about the role of the respondent and after going through the entire case papers granted bail and we see no reasons to interfere with the order passed by the ld. Special Judge. Therefore, the appeal preferred by the State, in our view, is liable to fail.

8. For the foregoing reasons, the appeal preferred by the State for the cancellation of the bail granted to the respondent under sec. 34 of POTA read with sec. 439(2) of CrPC, is dismissed.

(A.R. DAVE, J.)

(H.B. ANTANI, J.)

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